Supreme Court, U.S.
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In The
Supreme Court of the United States

FORGITRON LLC,
Petitioner,

v.

ACCURIDE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 14, 2009

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Sixth Circuit err when it held that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, permits a District Court to grant a motion to compel arbitration by ordering the parties to mediate the dispute?

II. Did the United States Court of Appeals for the Sixth Circuit err when it held that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, permits a District Court, in an action involving a contract in which meditation is an unsatisfied condition precedent to arbitration, to order the parties first to mediate, and then to arbitrate, a dispute?

LIST OF ALL PARTIES TO THE PROCEEDING

All of the parties to the proceeding are set forth in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation owning 10% or more of the membership units of Petitioner, Forgitron LLC.

TABLE OF CONTENTS

Questions Presented for Review i

List of All Parties to the Proceeding ii

Rule 29.6 Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Basis for Jurisdiction of this Court 1

Relevant Statutory Provisions 1

Statement of the Case 2

A. Introduction 2

B. Facts Material to Consideration of the Questions Presented 3

1. The Parties Executed the Supply and Services Agreement, which Permitted only Limited Recourse to Arbitration. . . 3

2. The Parties' Relationship Ended, and Accuride Waived Any Right to Seek Arbitration 4

3. The District Court Erroneously Granted Accuride's Motion to Compel Arbitration 6

Reasons For Granting The Writ 7

I. The Decision Below Conflicts with This Court's Recent Precedents 8

A. Mediation 8

B. Conditions Precedent 10

II. The Decision Below Is in Conflict with the Decisions of Other Circuit Courts 12

A. Mediation 12

B. Conditions Precedent 13

Conclusion 16

Appendix

Appendix A - Sixth Circuit Order (July 25, 2008) 1a

Appendix B - District Court Memorandum of Opinion and Order (August 17, 2007) 3a

Appendix C - Sixth Circuit Order re Rehearing (October 20, 2008) 15a

Appendix D - N.D. Ohio No. 07-833, ECF No. 15 Exhibit B, Supply and Services Agreement . 17a

Appendix E - 9 U.S.C. §§ 2-4 . . . . . 22a

TABLE OF AUTHORITIES

Cases

Advanced Bodycare Solutions, LLC v. Thione International, Inc.,
524 F.3d 1235 (11th Cir. 2008) 9, 12

AT&T Technologies, Inc. v. Communications Workers of Am.,
475 U.S. 643 (1986) 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 8

Citizens Bank v. Alafabco, Inc.,
539 U.S. 52 (2003) 8

Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.,
529 U.S. 193 (2000) 8

E.E.O.C. v. Waffle House, Inc.,
534 U.S. 279 (2002) 8, 11

Fit Tech, Inc. v. Bally Total Fitness Holding Corp.,
374 F.3d 1 (1st Cir. 2004) 10

General Motors Corp. v. Pamela Equities Corp.,
146 F.3d 242 (5th Cir. 1998) 9

Green Tree Financial Corp. v. Bazzle,
539 U.S. 444 (2003) 8

Green Tree Financial Corp.-Alabama v. Randolph,
531 U.S. 79 (2000) 8

Hall Street Assoc., L.L.C. v. Mattel, Inc.,
128 S.Ct. 1396, 170 L.Ed.2d 254
(Mar. 25, 2008) 2, 8

Harrison v. Nissan Motor Corp.,
111 F.3d 343 (3d Cir. 1997) 9, 10

HIM Portland, LLC v. DeVito Builders, Inc.,
317 F.3d 41 (1st Cir. 2003) 13, 14

Kemiron Atl., Inc. v. Aguakem Int'l Inc.,
290 F.3d 1287 (11th Cir. 2002) 13, 14

Mantaline Corp. v. PPG Indus.,
No. 97-4773 (6th Cir. June 8, 2000), 229 F.3d
659, 2000 WL 799337 15

Mastrobuono v. Shearson Lehman Hutton,
514 U.S. 52 (1995) 10, 14

McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.,
858 F.2d 825 (2d Cir. 1988) 9

Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n,
218 F.3d 1085 (9th Cir. 2000) 10

Preston v. Ferrer,
128 S.Ct. 978, 169 L.Ed.2d 917 (2008) 8

Southland Corp. v. Keating,
465 U.S. 1 (1984) 12

Statutes

9 U.S.C. § 2 ..... 2, 8

9 U.S.C. § 3 ..... 2, 15

9 U.S.C. § 4 ..... 2, 15

9 U.S.C. § 5 9

9 U.S.C. § 7 9

9 U.S.C. §§ 9-16 9

28 U.S.C. § 1254(1) 1

Rules

Sup. Ct. R. 10.1(a) 7

Sup. Ct. R. 10.1(c) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner, Forgitron LLC ("Forgitron"), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The July 25, 2008 decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Northern District of Ohio, Eastern Division, is not published. (App., *infra,* at 1a-2a). The Sixth Circuit's unpublished order denying Petitioner's Petition for Panel Rehearing or Rehearing *En Banc* was filed on October 20, 2008. (App., *infra,* at 15a-16a).

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing Forgitron's claims against Respondent, Accuride Corporation ("Accuride"), and ordering the parties "to proceed to mediation . . . and to undertake this obligation in good faith" and thereafter to "submit the matter to binding arbitration," was filed on August 17, 2007, and it is unreported. (App., *infra,* at 3a-14a).

BASIS FOR JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 25, 2008. (App., *infra,* at 1a-2a). A timely Petition for Panel Re-hearing or Re-hearing *En Banc* was denied on October 20, 2008. (App., *infra,* at 15a-16a). The jurisdiction of this Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions, 9 U.S.C. §§ 2, 3 and 4, are set forth in full at App., *infra*, 22a-24a.

STATEMENT OF THE CASE

A. Introduction.

This case raises the fundamental question of whether the Federal Arbitration Act (the "FAA") authorizes a District Court to order parties to mediate as opposed to arbitrate. This case was originally brought by Accuride, invoking federal diversity jurisdiction (28 U.S.C. § 1332). Forgitron is an Ohio limited liability company with its principal place of business in Brooklyn, Ohio, and Accuride is a Delaware corporation with its principal place of business in Evansville, Indiana. (App., *infra,* at 17a). Accuride filed suit to enforce a covenant not to compete in a Supply and Services Agreement (the "Agreement") between the parties. (App., *infra,* at 5a). Forgitron filed several counterclaims, after which it ceased operations and Accuride dismissed its claims. (App., *infra,* at 5a).

At the heart of this case lies the impact of this Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 170 L.Ed.2d 254 (Mar. 25, 2008). Also at issue is the conflict between the summary decision of the Sixth Circuit and the law of at least two other circuits – in particular, the First and the Eleventh, where those jurisdictions prohibit reliance upon the FAA to compel mediation. Here, the Sixth Circuit – by way of an affirmance without opinion that failed to recognize the importance of the issues raised by the compelled mediation – permitted the District

Court to order the parties to mediate their dispute even though the FAA grants it no such authority.

B. Facts Material to Consideration of the Questions Presented.

1. The Parties Executed the Supply and Services Agreement, which Permitted only Limited Recourse to Arbitration.

On or about June 30, 2005, Accuride and Forgitron executed the Agreement, in which Accuride stated, among other things, that it "desire[d] to purchase Finished Wheel Blanks from Forgitron based on the terms of [the] Agreement." (App., *infra,* at 18a). The Agreement provided for four methods of dispute resolution – a senior officers' meeting, mediation, arbitration, and litigation. (App., *infra,* at 18a-21a). The Agreement first required that "senior officers of each party" were "obliged to meet . . . within thirty (30) days of notification of the Dispute." (App., *infra,* at 19a). If the senior officers' meeting did not result in resolution, "any one of such senior officers of each party ***may*** require that the dispute shall be mediated." (App., *infra,* at 19a, emphasis added). Arbitration was provided for only if mediation was ***requested***, and only if the mediation failed to resolve the dispute:

> If an agreement or solution is not reached within ninety (90) days of ***commencement of [the] mediation process*** or if an agreement is not reached on the selection of a mediator, the Dispute shall be referred for final solution by binding arbitration . . . .

(App., *infra,* at 20a, emphasis added). Thus, the only "Disputes" which Forgitron could have agreed to arbitrate were those for which a senior officers' meeting occurred within thirty days of notice of the Dispute, and after which a mediation had: (1) been requested by a senior officer of either party, and (2) failed to result in resolution.

The dispute resolution procedure further provided that litigation was an additional option:

> [14(e)] Rights of Parties. The use of any of the above procedures shall not be construed under the doctrine of laches, waiver or estoppel to affect adversely the right of either party, and nothing in this section shall prevent either party from resorting to judicial proceedings ***if good faith efforts to resolve the Dispute under these procedures have been unsuccessful; or interim relief from a court is necessary to prevent serious and irreparable injury to any of the parties***.

(App., *infra,* at 21a, emphasis added).

2. The Parties' Relationship Ended, and Accuride Waived Any Right to Seek Arbitration.

After the execution of the Agreement, Forgitron provided Accuride with sample wheels that Accuride improperly rejected. (*See* App., *infra,* at 8a). On November 4, 2006, after several good faith attempts to obtain performance from Accuride under the Agreement, Forgitron informed Accuride that it was evident that Accuride had no intention of performing

under the Agreement and that Forgitron was returning Accuride's wheel tooling and ceasing its relationship with Accuride. (*See* App., *infra,* at 5a).

Accuride replied to Forgitron's notice by demanding that Forgitron adhere to the Agreement's unreasonable noncompetition provisions. Forgitron disputed the continued validity of the provisions and, on December 4, 2006, Forgitron demanded that, if Accuride wished to proceed as if the Agreement were valid, it had to follow the dispute resolution provisions therein.

The Agreement required a principals' meeting to occur within thirty days of Forgitron's demand, (App., *infra,* at 19a), but Accuride did not respond to Forgitron's December 4 demand for the meeting for over six weeks. A meeting did not actually take place until March 19, 2007, some three months after the demand for same, and in that meeting Accuride was unwilling to make any proposals. Then, Accuride – without so much as suggesting that the parties proceed to mediation – filed suit against Forgitron the next day, on March 20, 2007. Subsequently, pursuant to paragraph 14(c) of the Agreement and in light of failed efforts to resolve the dispute, Forgitron filed its compulsory counterclaims. (*See* App., *infra,* at 5a). Accuride did not request mediation at any time, and has still not demanded mediation as of the filing of this Petition (nor has Forgitron), but Accuride responded to Forgitron's counterclaims with a Motion to dismiss those claims and to compel arbitration.

3. The District Court Erroneously Granted Accuride's Motion to Compel Arbitration.

On August 17, 2007, the District Court entered a Memorandum of Opinion and Order and a Judgment Entry granting Accuride's Motion to Dismiss and to Compel Arbitration by requiring the parties "to proceed to mediation as set forth" in the Agreement "and to undertake this obligation in good faith. Should the mediation prove unsuccessful, the parties are directed to submit the matter to binding arbitration." (App., *infra,* at 13a).

In its Memorandum of Opinion and Order, the District Court erroneously summarized the parties' agreed dispute resolution procedure:

> The parties must first make an ***attempt at informal resolution*** of their dispute. [Agreement at] § 14(a). If that fails, ***they must*** submit the dispute to non-binding mediation. *Id.* § 14(b). If mediation fails, the parties must submit the dispute to binding arbitration. *Id.* § 14(c). An exception to the Agreement permits ***Accuride*** to seek injunctive relief from a court to enforce Forgitron's non-competition obligations under Section 10 of the Agreement. *Id.* § 14(f).

(App., *infra,* at 4a, emphasis added). First, the District Court ignored that the Agreement required the "attempt at informal resolution" to take place between "senior officers of each party" who were "obliged to meet for this purpose within thirty (30) days of notification of the Dispute." (App., *infra,* at 19a). The District Court also misread the contractual clause

which states that, if the senior officers' meeting did not result in resolution, "any one of such senior officers ***may*** require that the dispute shall be mediated." (App., *infra,* at 19a).

Thus, the District Court wrote into the parties' agreement the notion that mediation was a mandatory procedure rather than an optional procedure. The District Court compounded its error by failing to recognize that the mediation procedure was a condition precedent to arbitration. (App., *infra,* at 20a). The District Court also overlooked Forgitron's explicit right to pursue litigation as an option. (App., *infra,* at 21a). Forgitron timely appealed the District Court's erroneous decision, but immediately at the conclusion of oral argument, and without a separate opinion, the Sixth Circuit affirmed the District Court. (App., *infra,* at 1a-2a).

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for two main reasons. First, the petition should be granted under Supreme Court Rule 10.1(c) because the Sixth Circuit has "decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." The decision of the Sixth Circuit contradicts recent Supreme Court precedent precluding extra-Congressional expansion of the scope of the Federal Arbitration Act and enforcement of an arbitration provision in a manner that is inconsistent with the terms of the parties' agreement. Second, the petition should be granted under Supreme Court Rule 10.1(a) because the Sixth Circuit "has entered a decision in

conflict with the decision of another United States Court of Appeals on the same important matter." The Sixth Circuit's decision conflicts with Eleventh Circuit authority prohibiting the use of the FAA to compel mediation and with First Circuit authority finding a waiver of arbitration by a party that failed to demand mediation that was a condition precedent.

In the past decade, this Court has repeatedly granted certiorari to decide questions of construction of the FAA. *See, e.g., Hall Street, supra; Preston v. Ferrer,* 128 S.Ct. 978, 169 L.Ed.2d 917 (2008); *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003); *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52 (2003); *E.E.O.C. v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Circuit City Stores. Inc. v Adams,* 532 U.S. 105 (2001); *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.,* 529 U.S. 193 (2000). This Court should grant Forgitron's petition as well.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT PRECEDENTS.

A. Mediation.

The FAA applies only to "an agreement in writing to submit to arbitration an existing controversy." 9 U.S.C. § 2. This Court has not yet ruled on the question of whether the FAA may be relied upon by a District Court in order to compel mediation. However, in *Hall Street*, this Court held that parties cannot, by contract, expand the scope of judicial review set forth in the FAA. *See* 128 S.Ct. 1396, 1404. Here, the Sixth Circuit has affirmed the District Court's

misinterpretation of the parties' contract to expand the scope of judicial enforcement under the FAA.

"[T]he FAA does not define the term 'arbitration,' and both courts and commentators have struggled to do so." *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3d Cir. 1997). The FAA may not define "arbitration," but no reasonable reading of the term can include "mediation."[1] It is telling that the FAA includes detailed provisions relating to the appointment of arbitrators (*see* 9 U.S.C. § 5), the power of arbitrators to issue summons and to compel the attendance of witnesses (*see* 9 U.S.C. § 7), and procedures for making, confirming, vacating and appealing an award (*see* 9 U.S.C. §§ 9-16). The FAA includes no provisions describing any part of a mediation process, and no wonder – arbitration is a different procedural animal.

Decisions of the lower courts make it clear that arbitration requires that a decision by a third party issue. "Arbitration is the reference of a particular dispute to an impartial third person chosen by the parties to a dispute who agree, in advance, to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 246 (5th Cir. 1998) (citations omitted). Other courts are in accord. *See, e.g., McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d

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[1] As the Eleventh Circuit held in *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, 524 F.3d 1235 (11th Cir. 2008), while arbitration results in a binding award, mediation is a non-binding process that "does not resolve a dispute, it merely helps the parties to do so." *See id.* at 1240.

825, 830 (2d Cir. 1988) ("the language clearly manifests an intention by the parties to submit certain disputes to a specified third party for binding resolution."); *see also Harrison,* 111 F.3d at 350 ("the essence of arbitration" is that parties "agreed to arbitrate [their] disputes through to completion, *i.e.*, to an award made by a third-party arbitrator.").[2]

B. Conditions Precedent.

The decisions of the District Court and the Sixth Circuit also conflict with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52 (1995). In that case, the Court specified that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." *Id.* at 57. *Mastrobuono* supports the conclusion that, were a court to employ the FAA to require a party to participate in contractually optional mediation before arbitrating a dispute, the "result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced ***according to their terms***." *Id.* (emphasis added). "Absent some ambiguity in the agreement . . . it is the

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[2] Other courts have agreed with these principles through their application of the FAA to other dispute resolution procedures. *Compare Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (accounting remedy in an asset purchase agreement was "arbitration" for purposes of FAA, because it was final, involved an independent adjudicator, and provided an opportunity for each side to present its case; such a procedure is "arbitration in everything but name"), *with Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000) ("arbitration and appraisal are distinct methods of dispute resolution and it cannot be assumed that because the FAA governs the former it necessarily must apply to the latter").

language of the contract that defines the scope of disputes subject to arbitration." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. at 289. More specifically:

> Arbitration is a matter of contract and a party ***cannot be required to submit to arbitration any dispute which he has not agreed to so submit*** . . . . This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648-49 (1986) (emphasis added).

According to the plain language of the Agreement, arbitration of a claim will proceed only after one of the parties demands mediation following a timely senior officers' meeting and "an agreement or solution is not reached within ninety (90) days ***of commencement of [the] mediation process or if an agreement is not reached on the selection of a mediator***." (App., *infra*, at 20a, emphasis added). None of these events – a demand for mediation, commencement of the mediation process, or any attempts to select a mediator – ever occurred. The contract terms also allowed Forgitron to resort to the courts rather than to arbitration where good faith attempts to resolve the dispute had failed (they had) and where Forgitron sought injunctive relief (it did). Under no defensible reading of the contract can it be held that Forgitron consented to compulsory mediation in all circumstances, but the District Court's decision wrote such consent into the parties' contract. The conflict

between the opinion below and these Supreme Court precedents warrants review by this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

A. Mediation.

The goal of Congress in enacting the FAA was to create a "uniform federal law" governing the enforcement of arbitration agreements in the federal courts. *See Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984). There is now no uniformity, however, on the issue of whether mediation is a dispute resolution procedure that can be compelled through the FAA. The Sixth Circuit has held that it is, but the Eleventh Circuit recently held that it is not.

In *Advanced Bodycare Solutions*, the Eleventh Circuit held, in stark contrast to the instant appeal, that the FAA does not permit "enforcement of a contract clause requiring an aggrieved party, prior to filing a lawsuit, to institute mediation or non-binding arbitration." *Id.* at 1236. "*FAA remedies, including mandatory stays and motions to compel, are not appropriately invoked to compel mediation.*" *Id.* at 1240 (emphasis added). The District Court's decision, requiring the parties first to mediate, and then to arbitrate, clearly would have been reversed by the *Advanced Bodycare* court. The Sixth Circuit, however, affirmed here.

B. Conditions Precedent.

In addition, the District Court's decision, as affirmed by the Sixth Circuit, conflicts with the decisions of the First Circuit in *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), and of the Eleventh Circuit in *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) – and, indeed, with prior authority from the Sixth Circuit itself. In *HIM Portland*, the parties' agreement had dispute resolution provisions similar to those at issue here:

> Claims, disputes and other matters in question arising out of or relating to this Contract . . . shall be referred initially to the Architect for decision. Such matters . . . shall, after initial decision by the Architect, or 30 days after submission of the matter to the Architect, be ***subject to mediation*** as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. . . .
>
> The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. . . .
>
> ***Claims, disputes and other matters in question arising out of or relating to the Contract that are not resolved by mediation . . . shall be decided by arbitration*** . . . .

Id. at 42-43 (emphasis added). When one of the parties sought to compel arbitration before mediation, a condition precedent to arbitration, had been requested, the trial court denied the motion. *Id.* The appellate court affirmed:

> Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation. *See Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002). In *Kemiron*, the Eleventh Circuit faced a similar issue and held: "the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort." *Id.* at 1291. Further, "[b]ecause neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." *Id.* Congress did not enact the FAA to "operate without regard to the wishes of the contracting parties" *Mastrobuono*, 514 U.S. at 57, 115 S.Ct. 1212. Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA. Because neither HIM nor DeVito ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration.

Id. at 44.

Thus, a court may compel arbitration only "in accordance with the terms of the agreement." 9 U.S.C. §§ 3, 4. To do so, the court must first satisfy itself "that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." *Id.*

A court also must find that no waiver occurred by the party seeking arbitration. *See, e.g., Mantaline Corp. v. PPG Indus.*, No. 97-4773 (6th Cir. June 8, 2000), 225 F.3d 659 (table case), 2000 WL 799337, at * 4. In conflict with the statute and the cases cited above, the District Court and the Sixth Circuit failed to hold that Accuride's failure to request mediation at the appropriate time was an unsatisfied condition precedent to any right to compel arbitration such that Accuride waived its arbitration right by failing to mediate. Indeed, adding insult to injury, the District Court *ordered Forgitron to satisfy the condition for Accuride.*

The decision below charts an unwelcome course which could enable courts to divert cases from litigation to arbitration regardless of whether any of the conditions precedent to arbitration had been satisfied. This Court's review is necessary to preserve the important right of parties to seek redress for their injury in the courts where they have agreed to arbitrate only under specified contractual conditions.

In sum, under an appropriate construction of the FAA, only an arbitration proceeding that involves a final and binding decision by a third party can be

enforced through a motion to compel arbitration. Mediation is not such a proceeding, and it is thus not enforceable under the FAA. Further, where, as here, mediation is a condition precedent to arbitration, the failure to demand mediation waives a party's right to demand arbitration later. Because the District Court and the Sixth Circuit held otherwise – contradicting both the precedents of this Court and the decisions of other circuits – this Court should accept review of the questions presented herein. Forgitron's Petition should be granted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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Dated January 14, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 07-4190

[Filed July 25, 2008]

ACCURIDE CORPORATION,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
FORGITRON, LLC,	)
	)
Defendant - Appellant	)
	)

ORDER

BEFORE: COOK and GRIFFIN, Circuit Judges; MARBLEY, U.S. District Judge.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

* The Honorable Algenon L. Marbley, U.S. District Judge for the Southern District of Ohio, sitting by designation.

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is **AFFIRMED** upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Issued: July 25, 2008

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:07 CV 833

[Filed August 17, 2007]

ACCURIDE CORP.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FORGITRON, LLC,	)
	)
Defendant.	)
	)

MEMORANDUM OF OPINION AND ORDER

Before the Court is Plaintiff Accuride Corporation's Motion to Compel Arbitration and to Dismiss or, Alternatively, to Stay Proceedings Pending Arbitration ("Motion to Compel") (**ECF No. 26**). For the following reasons, the Motion to Compel is **GRANTED** to the extent provided in Section IV below, and the case is **DISMISSED WITHOUT PREJUDICE**.

I.

This case arises from a Supply and Services Agreement entered between Accuride and Defendant Forgitron, LLC, on June 30, 2005 (the "Agreement").[1] Pursuant to the Agreement, Accuride promised to purchase forged aluminum wheel blanks for certain commercial vehicles from Forgitron in exchange for Forgitron's promise to use commercially reasonable efforts to manufacture and supply those wheel blanks. The Agreement contains pages worth of obligations the parties have undertaken to each other in order to achieve the desired, mutually profitable result. The Agreement also contains a mandatory dispute resolution procedure culminating in binding arbitration to resolve "all claims, disputes and other matters in controversy . . . arising directly or indirectly out of or related to this Agreement, or the breach thereof, whether contractual or non-contractual . . .." *Agreement* § 14. The parties must first make an attempt at informal resolution of their dispute. *Id.* § 14(a). If that fails, they must submit the dispute to non-binding mediation. *Id.* § 14(b). If mediation fails, the parties must submit the dispute to binding arbitration. *Id.* § 14(c). An exception to the Agreement permits Accuride to seek injunctive relief from a court to enforce Forgitron's non-compete obligations under Section 10 of the Agreement.[2] *Id.* § 14(f). In the fall of

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[1] The Agreement is located at ECF No. 15, Ex. B.

[2] Notwithstanding the dispute resolution procedures set forth in this Section 14, Accuride shall be entitled to seek injunctive relief, specific performance or other equitable relief pursuant to Section 10(c) and, by agreeing to the dispute resolution procedures in this Section 14, Forgitron acknowledges and agrees that it does not

2006, the relationship between Accuride and Forgitron broke down irretrievably and the parties terminated the Agreement.

On March 20, 2007, Accuride filed the instant Complaint for Preliminary and Permanent Injunctive Relief asking the Court to enjoin Forgitron's alleged breach of its Section 10 non-compete obligations. Forgitron filed an Answer and Counterclaim, followed shortly thereafter by an Amended Answer and Counterclaim. *Respectively, ECF Nos. 15, 17.* The thrust of Forgitron's Counterclaim is that Accuride induced Forgitron to enter into a contract that Accuride never intended to perform, the purpose for which was to hinder Forgitron's ability to compete in the relevant market. *ECF No. 17.* Relying on this premise, Forgitron asserted against Accuride federal and state antitrust claims (Counts 1-4), declaratory judgment, breach of contract, unjust enrichment and fraudulent inducement claims (Counts 5-8) and various tort claims (Counts 9-12). *Id.* After Forgitron apprised the Court and opposing counsel that it had closed its operations, Accuride agreed to a dismissal without prejudice of its complaint. *See ECF Nos. 20, 21.* Forgitron, however, refused to dismiss its claims against Accuride. In response, Accuride filed the pending Motion to Compel Arbitration, to which Forgitron has filed an opposition brief, *ECF No. 27*, and Accuride has filed a reply, *ECF No. 28.*[3]

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intend to deprive any court of its jurisdiction to issue an injunction to prevent breaches of Section 10, ... Agreement § 14(f).

[3] Forgitron recently conducted a sale of its assets. In a teleconference held on August 6, 2007, counsel for Forgitron

Accuride contends that the arbitration provision is valid and enforceable, and that it is broad enough to encompass all of Forgitron's claims. Forgitron argues that the arbitration provision is not supported by consideration; Forgitron did not agree to arbitrate claims that were not mediated; and, at most, the case should be stayed so that mediation before the AAA can proceed and Forgitron can seek interim relief to prevent further anticompetitive conduct.

II.

The Federal Arbitration Act applies to all contracts reflecting transactions involving interstate commerce, and provides that arbitration provisions in such contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §§ 1, 2. Section 4 of the Act provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement . . . .

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reported to the Court and opposing counsel that it remains in business solely for the purpose of litigating its Counterclaim.

9 U.S.C. § 4. Section 3 of the Act provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant of the stay is not in default with such arbitration.

9 U.S.C. § 3. The Act, thus, establishes a policy favoring arbitration and requiring that courts "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also Allied-Bruce Terminex Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). Arbitration agreements are to be read liberally to effectuate their purpose, and are presumed to be valid and enforceable. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000); *Shearson*, 482 U.S. at 226. The party opposing the motion bears the burden of showing that the governing provision is either invalid, or does not encompass the claims at issue. *Green Tree Fin. Corp.*, 531 U.S. at 92.

The Sixth Circuit has articulated the following factors a district court must consider in deciding whether to compel arbitration. *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392 (6th Cir. 2003). First, the court must determine whether the parties agreed to arbitrate; second, the court must determine the scope of that agreement; third, the court must consider whether Congress determined that any statutory claims are nonarbitrable; and fourth, if some of the

claims are nonarbitrable, the court must decide whether to stay the litigation of those claims pending arbitration of the others. *Id.*

III.

A.

With respect to the first *Fazio* factor, Forgitron has not argued that the parties did not agree to arbitrate their disputes. Rather, Forgitron argues that the arbitration clause is not valid because it is not supported by consideration. According to Forgitron, the arbitration clause

> is part of a larger dispute resolution scheme that was intended to provide the parties with pre-litigation relief in the event that their relationship, *after its inception and after Accuride began purchasing product from Forgitron*, developed problems. It is undisputed, however, that Accuride never purchased a single production wheel from Forgitron. Accuride therefore failed to provide any consideration for Forgitron's purported agreement to arbitrate, so Accuride should not now be permitted to enforce the arbitration provision against Forgitron.

ECF No. 27, at 6. This argument lacks merit for several reasons.

First, Forgitron has cited no case law requiring an arbitration clause to have consideration *additional to* that supporting the contract as a whole. In fact, the case law is to the contrary. *See, e.g., Joseph v. MBNA*

Am. Bank NA, 148 Ohio App.3d 660, 664 (Ohio App. 8 Dist. 2002) (holding that separate consideration is not a requirement of a valid arbitration clause provided the underlying contract is supported by consideration).

Second, although a challenge to the validity of an arbitration clause contained in a contract is a matter to be resolved by the Court, a challenge to the validity of the contract as a whole must be decided by an arbiter. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Here, the crux of Forgitron's counterclaim is that the Agreement is not supported by consideration (and is thus invalid *ab initio*) because Accuride never purchased, or intended to purchase, a single production wheel blank from Forgitron. That is a challenge to the validity of the contract as a whole – not to the arbitration clause itself. *Id.*

Third, the Supreme Court has held that an arbitration clause may be severable from the remainder of the contract. *Buckeye Check Cashing*, 388 U.S. 440. Thus, in the absence of a legitimate challenge to the clause itself, it is enforceable regardless of the validity of the rest of the contract. *Id.*

Finally, there is nothing in the Agreement providing that the arbitration clause does not go into effect until after Accuride purchases its first production wheel blank from Forgitron.

B.

Next, the Court must determine whether Forgitron's claims are within the scope of the arbitration clause. We begin with the fundamental premise that any ambiguities as to the scope of the arbitration clause must be resolved in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995). The Supreme Court has previously held that an arbitration clause using the phrase "any controversy or claim arising out of or relating to this contract or the breach hereof" (almost identical to the one in this case) provides for extremely broad application. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n. 7 (1984) (*citing Prima Paint*, 388 U.S. at 403-04). The Sixth Circuit has held that where an arbitration provision is broad, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude a claim from arbitration, will remove the dispute from consideration by an arbiter. *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577 (6th Cir. 2003) (internal quotation marks and citations omitted). In addition, arbitration provisions apply equally to tort and statutory claims that "touch matters" covered by the contract. *See, e.g., Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir. 2003) (tort claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (statutory claims); *Prima Paint*, 388 U.S. at 403-04 (fraudulent inducement claims).

Forgitron's claims for declaratory judgment, breach of contract, unjust enrichment and fraudulent inducement (Counts 5-8) either arise from or are related to the Agreement. Through these claims,

Forgitron seeks a declaration from the Court that Accuride's failure to perform according to the terms of the Agreement excuses Forgitron's performance; damages for breach of the Agreement; invalidation of the Agreement due to fraud in the inducement, and quasi-contractual damages in the event the Agreement is invalidated. Forgitron's tort claims (i.e., tortious interference, unfair competition and spoliation found, respectively, in Counts 9, 11 and 12) are premised on the Agreement and the parties' relationship in the context of the Agreement. Forgitron's state and federal statutory claims (Counts 1-4, 10) are also related to the Agreement. Forgitron claims that Accuride's alleged anti-competitive conduct arose from its false expression of interest in having Forgitron serve as Accuride's aluminum wheel blank provider; its inducement of Forgitron to enter a contract that contained a strong non-compete clause; and its failure to perform under the contract while seeking enforcement of the Agreement's non-compete provision. In short, given the broad language of the arbitration clause and the strong federal policy favoring arbitration, the Court finds that all of Forgitron's claims are within the scope of the Agreement's arbitration provision.

C.

The third *Fazio* question the Court must decide is whether any of Forgitron's statutory claims are not arbitrable. Forgitron does not argue that any of its statutory claims are not arbitrable, confining its challenge instead to the validity of the Agreement. The law is clear, however, that arbitration provisions apply liberally to claims that "touch matters" covered by the contract in question, including statutory claims. *See,*

e.g., *Mitsubishi Motors Corp.*, 473 U.S. at 627 (agreement to arbitrate disputes applies to statutory antitrust and unfair competition claims); *Fazio*, 340 F.3d at 395 (agreement to arbitrate disputes applies to securities laws violations). The Supreme Court has noted that there is nothing in the FAA implying a presumption against the arbitration of statutory claims, and there is no reason to distort the process of contract interpretation in order to "ferret out inappropriate claims." *Mitsubishi Motors Corp.*, 473 U.S. at 625-27. Because the burden of proving nonarbitrability is on the party opposing the motion to compel, and because Forgitron has made no argument to the contrary, the Court concludes that Forgitron's statutory claims are arbitrable.

D.

Turning now to the last *Fazio* factor, relevant case law indicates that where a contract provides for final and binding arbitration of any disputes arising therefrom, dismissal of the case is an appropriate alternative to staying the case under 9 U.S.C. § 3. *See Dantz v. Apple Am. Group LLC*, 277 F.Supp.2d 794, 805 (N.D. Ohio 2003) (*citing Arnold v. Arnold Corp.*, 925 F.2d 1269 (6th Cir. 1990). Because all of Forgitron's claims are arbitrable, there is no good reason to stay this judicial case and dismissal is appropriate.

Forgitron has made the argument that the Court should not compel the parties to arbitrate its claims because Accuride failed to participate in the mandatory mediation process and, instead, filed a complaint for injunctive relief. In other words, because Accuride filed its complaint for injunctive relief, it has

waived the parties' obligation to submit their disputes to the dispute resolution procedures contained in Sections 14(a) through (c). However, the Supreme Court has held that any doubts concerning the scope of arbitrable issues, including "an allegation of waiver, delay, or a like defense," should be resolved in favor of arbitration. *Mitsubishi Motors*, 473 U.S. at 626 (*quoting Moses H. Cone Memorial Hosp.*, 460 U.S. 1, 24-25 (1983). Moreover, Accuride is expressly permitted to seek injunctive relief for any alleged breach of the non-compete provisions of the Agreement under Section 14(f). And Accuride's filing of a complaint for injunctive relief did not waive Forgitron's obligation to submit its claims, all of which are covered by the arbitration clause, to mediation and, if necessary, arbitration.

IV.

Based on the foregoing, the Court **GRANTS** the Motion to Compel (**ECF No. 26**) to the following extent. The parties are hereby directed to comply with the dispute resolution procedure they contractually negotiated. Because the parties' attempt at informal resolution failed, the Court hereby **ORDERS** the parties to proceed to mediation as set forth in Section 14(b) of the Agreement, and to undertake this obligation in good faith. Should the mediation prove unsuccessful, the parties are directed to submit the matter to binding arbitration. Because all of Forgitron's claims are arbitrable, there is no reason to stay this case, which is hereby **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

/s/Dan Aaron Polster August 17, 2007
Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 07-4190

[Filed October 20, 2008]

ACCURIDE CORPORATION,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
FORGITRON, LLC,	)
	)
Defendant - Appellant	)
	)

ORDER

BEFORE: COOK and GRIFFIN, Circuit Judges; MARBLEY,* U.S. District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court

* Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

APPENDIX D

N.D. Ohio No. 07-833, ECF No. 15

EXHIBIT B

Supply and Services Agreement

THIS SUPPLY AND SERVICES AGREEMENT (the "**Agreement**") is made effective as of the 30th day of June, 2005 (the "**Effective Date**") by and between **Forgitron, LLC**, a Ohio limited liability company, having its principal place of business at 8525 Clinton Road, Brooklyn, Ohio 44144, ("**Forgitron**") and **ACCURIDE CORPORATION**, a Delaware corporation, having its principal place of business at 7140 Office Circle, Evansville, Indiana ("**Accuride**"). Forgitron and Accuride are hereinafter referred to individually as a "party" and collectively as the "parties").

RECITALS:

WHEREAS, Forgitron has acquired certain equipment and processing techniques for the production of rotary forged aluminium wheels;

WHEREAS, Accuride is in need of forged, spun and heat-treated aluminum wheel blanks from which a 22.5 x 8.25 Class 8 wheel will be produced by Accuride ("**Finished Wheel Blanks**") to fulfill certain customer needs and requirements;

WHEREAS, Forgitron has commenced operations that will enable it to manufacture and supply finished Wheel Blanks on or before January 31, 2006;

WHEREAS, Forgitron desires to provide Finished Wheel Blanks to Accuride and Accuride desires to purchase Finished Wheel Blanks from Forgitron based on the terms of this Agreement; and

WHEREAS, due to the proprietary nature of information shared between Forgitron and Accuride, the parties desire to enter into certain mutual covenants to protect the confidentiality of such proprietary information,

NOW, THEREFORE, in consideration of the mutual promises, representations and warranties herein contained, and on the terms and subject to the conditions herein set forth, the parties hereto agree as follows:

* * *

14. **Dispute Resolution.** Except as provided in Section 14(f), all claims, disputes and other matters in controversy (herein called the "**Dispute**") arising directly or indirectly out of or related to this Agreement, or the breach thereof, whether contractual or non-contractual, and whether during the term or after the expiration or termination of this Agreement, shall be resolved exclusively according to the procedures set forth in this Section 14.

(a) Informal Resolution. The parties shall attempt to settle any Dispute arising out

of this Agreement through consultation and negotiation in good faith and in a spirit of mutual co-operation. If a Dispute is not resolved, either party may refer the matter to the senior officers of each party. The respective senior officers of the affected parties shall attempt to resolve the Dispute by meeting fully briefed on the issues and discussing the possible solutions and, if possible, agreeing on a solution or procedure for a solution (which may include one of the further steps set out below). The senior officers of each party shall be obliged to meet for this purpose within thirty (30) days of notification of the Dispute. If such meeting of senior officers does not conclude in an agreement acceptable to both parties within 15 days after the initial meeting date, then the matter shall be referred to mediation.

(b) Mediation. If a meeting of the senior officers of each party does not lead to a solution, any one of such senior officers of each party may require that the Dispute shall be mediated by an attorney with expertise in the field of the subject matter of the Dispute, selected from a panel of mediators proposed by the American Arbitration Association ("**AAA**"). The parties agree to co-operate and participate with the mediation process by making available, promptly and adequately resourced and available senior executives and adhering to the

processes proposed by such mediator. Costs of the mediator shall be borne equally by the parties to the Dispute; other costs shall be borne by the party incurring them. The mediator shall be selected by agreement of the parties, not to be delayed or withheld.

(c) Arbitration. If an agreement or solution is not reached within ninety (90) days of commencement of mediation process or if an agreement is not reached on the selection of a mediator, the Dispute shall be referred for final solution by binding arbitration in Cleveland, Ohio under the arbitration rules of the AAA by a single arbitrator agreed between the parties or failing such agreement within thirty (30) days, by a panel of three arbitrators, of whom one shall be appointed by Forgitron, one shall be appointed by Accuride, and the third shall be appointed by the other two arbitrators. The arbitration award shall be in writing and shall include a statement of findings of fact and conclusions of law for the award. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with the Federal Arbitration Act in any court having jurisdiction.

(d) No Punitive Damages, Fees. Under no circumstances shall the arbitrator(s) have any authority to award punitive damages. The prevailing party shall not

be entitled to reimbursement of attorneys' and other fees incurred in satisfying its judgment.

(e) Rights of Parties. The use of any of the above procedures shall not be construed under the doctrine of laches, waiver or estoppel to affect adversely the right of either party, and nothing in this section shall prevent either party from resorting to judicial proceedings if good faith efforts to resolve the Dispute under these procedures have been unsuccessful; or interim relief from a court is necessary to prevent serious and irreparable injury to any of the parties.

* * *

APPENDIX E

UNITED STATES CODE
TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms

of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where

such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.